88-2072

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM OF 1988

DANNY L. MILBURN,

Petitioner,

vs.

HAWKEYE BANK & TRUST N.A., OF CENTERVILLE-SEYMOUR f/k/a CENTERVILLE NATIONAL BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

DANNY L. MILBURN

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QUESTIONS FOR REVIEW

ISSUE NO. I: CAN A STATE DEFINE PROPERTY RIGHTS IN SUCH A MANNER THAT SUBSTANTIVE RIGHTS ARE EXTINGUSIHED TO A ONE WHO HAS UNSUCCESSFULLY ATTEMPTED TO REORGANIZE IN BANKRUPTY?

ISSUE NO. II: IS IOWA CODE SECTION 628.4 CONTRARY TO FEDERAL LAW, AND FACIALLY OR AS APPLIED CONSTITUTIONALLY REPUGNANT, WHEN IT PROVIDES THAT THE USUAL RIGHTS TO REDEEM FROM SHERIFF'S SALE WILL BE DENIED TO ONE WHO HAS PREVIOUSLY FILED FOR BANKRUPTCY, FOR THE REASON THAT IT:

A. VIOLATES THE SUPREMACY CLAUSE (ARTICLE VI, PARAGRAPH 2), OR

B. ALLOWS THE TAKING OF PROPERTY WITHOUT DUE PROCESS CONTRARY TO THE PROVISIONS OF AMENDMENT FOURTEEN, OR

C. IS PUNITIVE IN NATURE, UNREASONABLY CLASSIFIES AND DISCRIMINATES AGAINST ONE FILING BANKRUPTCY, AND CONSTITUTES A SANCTION FOR INVOCATION OF BANKRUPTCY DUE PROCESS, THEREBY VIOLATING DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF AMENDMENT FOURTEEN

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1. The caption in the style of this writ contains the names of all the parties to this proceeding, such parties being Danny L. Milburn and Hawkeye Bank and Trust, N.A. of Centerville-Seymour.

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DANNY L. MILBURN,
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HAWKEYE BANK & TRUST N.A., OF CENTERVILLE-SEYMOUR f/k/a CENTERVILLE NATIONAL BANK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

The Petitioner, Danny L. Milburn, requests that a Writ of Certiorari issue to review and correct the majority opinion of the Iowa Supreme Court, which held (three justices dissenting) that Iowa can constitutionally treat one who has filed for reorganization in bankruptcy differently by denying to him the usual rights to redeem his property following sheriff's sale. Such rights are substantive property rights under Iowa law which may be assigned. Although federal law makes such rights a part of the bankruptcy estate, Iowa law extinguishes such rights based solely upon the bankruptcy filing.

It appears to Danny L. Miburn that this question may be one of first impression to this Court.

OPINIONS IN THE COURTS BELOW

Following decree of foreclosure the trial Court granted Motion for Issuance for Sheriff's Deed in Lieu of Sheriff's Certificate on all land except the homestead, and entered order that the debtor could repurchase the homestead. On appeal, the Iowa Supeme Court ruled that right to redeem and right to repurchase homestead were both extinguished by the invocation of the federal bankruptcy stay. The opinion of the Iowa Supreme Court is in the Appendix attached hereto, and Petitioner believes that such opinion adequately sets forth the issues and facts necessary for review here.

STATEMENT OF JURISDICTION

Jurisdiction of the Iowa District Court was invoked as a farm real estate mortgage foreclosure action under Chapter 654, Code of Iowa.

Jurisdiction of the Iowa Supreme Court was invoked under Iowa Appellant Rule 1.

This Court has Jurisdiction to issue a Writ of Certiorari to the Iowa Supreme Court pursuant to 28 USC 1257(3) concerning title, right, privilege or immunity claimed under

the Constitution and statute of the United States, and the United States Constitution Amendments Five and Fourteen and the Federal Supremacy Clause, Article Six, Paragraph 2.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

11 USC 541(c)(1) provides that:

...an interest of the debtor in property becomes property of the estate... notwithstanding any provision in an agreement, transfer instrument, or applicable non-bankruptcy law--....

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee...and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property. (emphasis added).

11 USC 108(b) provides in relevant part that:

... if applicable nonbankruptcy law, an order ...or an agreement fixes a period within which the debtor ... under this title may ... cure a default ... and such period has not expired before the date of the filing of the petition, the trustee may cure ... before the latter of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

In pertinent part, 628.3, The Iowa Code, provides,

The debtor may redeem real property at any time within one year from the date of sale, and will, in the meantime, be entitled to the possession thereof; and the first six months thereafter such right of redemption is exclusive....

In pertinent part, 628.4, The Iowa Code, provides,

628.4 Redemption prohibited. A party who has....stayed execution on the judgment, is not entitled to redeem.

The Supremacy Clause of the Constitution of the United States of America, Section VI, Paragraph 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment Five of the Bill of Rights of the Constitution of the United States of America provide in pertinent part:

No person shall...be deprived of life, liberty or property, without due process of law; ....

Amendment Fourteen, Section 1 of the Constitution of the United States of America provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

This matter stems from a foreclosure of a real estate mortgage concerning farm real estate. Decree of foreclosure upon summary judgment was filed December 23, 1986. On April 22, 1987, Danny Milburn filed a Petition in Bankruptcy pursuant to Chapter 12 of Title 11. The automatic stay of Bankruptcy delayed Sheriff's sale. The Bankruptcy proceeding was dismissed. Prior to Sheriff's sale Plaintiff asked the Court for issuance of Sheriff's deed in lieu of Sheriff's certificate.

Hearing was held in the Iowa District Court for Appanoose County on November 6, 1987, and the Court relying upon the decision of First National Bank of Gliden v. Matt Bauer Farms, Inc., 408 NW2d 51 (Iowa 1987) ruled that, except for his homestead, Danny Milburn had no right to redeem because invoking the stay in Bankruptcy had extinguished such right. On appeal, the Iowa Supreme Court ruled that the invocation of the bankruptcy stay had extinguised all redemption rights including homestead.

B. STATEMENT OF FACTS

Danny Milburn is an individual owning approximately 320 acres of farm ground in Appanoose County, Iowa, upon which decree of foreclosure was entered on or about December 23, 1986. Chapter 12 of Title 11 was passed and first effective on Thanksgiving Day, 1986. Thereafter, Milburn invoked the provisions of 11 USC 362 by voluntary commencement of a Chapter 12 Bankruptcy proceeding. That proceeding was dismissed in October, 1987. The invocation of that stay postponed the Sheriff's sale arising from the decree of foreclosure. The issues before the Court are whether: (1) a state can define property rights to be contingent upon whether one has sought the protection of federal bankrupcy, and (2) whether or not the invocation of such federal stay can be made by state law to automatically extinguish substantive property rights of redemption (Code of Iowa, Chapter 628.4) and to

repurchase the homestead (Code of Iowa 654.16). In the event such right of redemption and to repurchase was extinguished by invocation of federal relief, the Bank was entitled to Sheriff's Deed with no redemption rights in Danny Milburn. In the event the Court below was incorrect, Danny Milburn has redemption rights concerning such real property and the right to repurchase the homestead.

C. MATTERS RAISED IN THE COURTS BELOW

Bank filed motion in the Iowa District Court asking for ruling that the filing of bankruptcy and invocation of the stay by the debtor had caused him under Iowa law to relinquish Iowa rights to redeem and to repurchase his homestead, and asking for sheriff's deed (absolute and final) rather than the sheriff's certificate (which would begin the period of redemption). Debtor resisted such motion stating that Iowa law purporting to terminate rights to redeem and to repurchase homestead for having invoked the stay of bankruptcy terminated rights protected by federal supreme law, and violated Fourteenth Amendment rights to due process and equal protection. The District Court entered order granting sheriff's deed, but preserving the right of debtor to repurchase homestead. On appeal, the Iowa Supreme Court upheld the constitutionality of such Iowa statute.

D. DISPOSITION IN THE LOWER COURTS

The trial Court granted Motion for Issuance for Sheriff's Deed in Lieu of Sheriff's Certificate on all land except the homestead, and entered order that the debtor could repurchase the homestead. On appeal, the Iowa Supeme Court ruled that right to redeem and right to repurchase homestead were both extinguished by the invocation of the bankruptcy stay.

REASONS WHY THE WRIT SHOULD BE GRANTED

ISSUE NO. I: CAN A STATE DEFINE PROPERTY RIGHTS IN SUCH A MANNER THAT SUBSTANTIVE RIGHTS ARE EXTINGUSIHED TO A ONE WHO HAS UNSUCCESSFULLY ATTEMPTED TO REORGANIZE IN BANKRUPTY?

The ultimate issue here would appear to be whether the tail is allowed to wag the dog! Federal bankruptcy law, to define property interests in the estate, refers to "applicable state law" on the "commencement of a case" in bankruptcy. Can a state under the guise of defining its property laws, legislate them in such a way that property rights of a bankrupt are substantially less than for others? That is, can the state define "applicable state law" to be different for those in bankruptcy.

It has long been held that the law of bankruptcy is the supreme law of the land. Re Watts, 190 U.S. 1 (1903). It has also

long been the rule that state law shall determine and define property rights, even those to be applied in bankruptcy. In re Turner, 29 B.R. 628 (D.C. ME 1983; In re Depoy, 29 B.R. 466 (N.D. Ind. 1983). The question presented here is whether a state may define property rights in such a manner that the filing of bankruptcy, in and of itself, will automatically modify, diminish or extinguish those rights. Stated otherwise, can the state under the guise of defining property rights, make property rights different for one who has filed bankrupt SOLELY BECAUSE OF THAT FILING.

The Iowa statutes provide that a debtor has one year to redeem following sheriff's sale following decree of foreclosure of a real estate mortgage concerning farm land. 628.3, Code of Iowa. Because of equal protection claims in other litigation, the Iowa Supreme Court has expanded that redemption period to TWO years in most relevant instances. FLB of Omaha v. Arnold, 426 N.W.2d 153 (Iowa, 1988). Iowa law further provides certain rights for repurchase of the homestead following sheriff's sale. However, if a person has filed bankruptcy and thereby invoked the automatic stay, the Iowa Supreme Court has held that, pursuant to Iowa statute, such person no longer has those rights following dimissal from bankruptcy.

Statistics indicate that only one-tenth of those debtors in Iowa seeking to

reorganize their farming operations have been successful. Those ninety per cent who have tried and failed, pursuant to the Iowa Supreme Court decision, have lost their rights to redeem and to repurchase their homestead. Their property rights under state law are substantially different BECAUSE THEY HAVE INVOKED FEDERAL DUE PROCESS in attempt to reorganize.

Petitioner believes that this has a chilling and detering effect upon those needing the protection of bankruptcy, constitutes a substantive penalty for invoking federal rights; constitutes a taking of federal rights without due process; and is a denial of equal protection of the law. Petitioner further believes that Iowa law is fatally in conflict with superior federal law.

ISSUE NO. II: IS IOWA CODE SECTION 628.4 CONTRARY TO FEDERAL LAW, AND FACIALLY OR AS APPLIED CONSTITUTIONALLY REPUGNANT, WHEN IT PROVIDES THAT THE USUAL RIGHTS TO REDEEM FROM SHERIFF'S SALE WILL BE DENIED TO ONE WHO HAS PREVIOUSLY FILED FOR BANKRUPTCY, FOR THE REASON THAT IT:

A. VIOLATES THE SUPREMACY CLAUSE (ARTICLE VI, PARAGRAPH 2), OR

B. ALLOWS THE TAKING OF PROPERTY WITHOUT DUE PROCESS CONTRARY TO THE PROVISIONS OF AMENDMENT FOURTEEN, OR

C. IS PUNITIVE IN NATURE, UNREASONABLY CLASSIFIES AND DISCRIMINATES AGAINST ONE FILING BANKRUPTCY, AND CONSTITUTES A SANCTION FOR INVOCATION OF BANKRUPTCY DUE PROCESS, THEREBY VIOLATING DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF AMENDMENT FOURTEEN

11 USC 541(c)(1) provides that:

...an interest of the debtor in property becomes property of the estate... notwithstanding any provision in an agreement, transfer instrument, or applicable non-bankruptcy law--....

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee...and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property. (emphasis added).

11 USC 108(b) provides in relevant part that:

... if applicable nonbankruptcy law, an order ...or an agreement fixes a period within which the debtor ... under this title may ... cure a default ... and such period has not expired before the date of the filing of the petition, the trustee may cure ... before the latter of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

[Debtor in possession in Chapter 12 is tantamount to "trustee" -- See, 11 USC 1203.]

The Iowa Code, Section 628.3 creates a right of redemption following entry of decree of foreclosure which is a property right remaining in the debtor. Section 628.25 makes that right assignable. Such right is a legal and equitable interest in property which constitutes a part of a debtor's bankruptcy estate. Johnson v. First Nat'l Bank, 719 F.2d 270 276 (C.A. 8, 1983), cert. denied, 465 U.S. 1012 (1984). Iowa Code Section 654.16 creates a right in the debtor for the repurchase of his homestead following sheriff's sale. The decision of the Iowa Supreme Court extinguishes these proprietary rights predicated solely from the invocation of a federal right provided in Title 11.

11 USC 541 identifies those assets which constitute the debtor's estate in Bankruptcy and which, pursuant to 28 USC 1334, during the course of the Bankruptcy are within the exclusive control of the United States District Court, and which Court may pursuant to 28 USC 157 delegate to the Bankruptcy Court. The decision of the Iowa Supreme Court violates the plain meaning, and the intended purpose, of 11 U.S.C. 541(c)(1), and

therefore the Supremacy Clause.

The automatic forfeiture of proprietary rights following, and based solely upon, commencement of a bankruptcy action also directly contravenes 108(b) which specifically alludes to non-bankruptcy law. More specifically, 11 USC 108(b) provides that Bankruptcy which is filed during the term of a redemption period will extend such redemption period for 60 days or the remaining term following the Order for Relief. See, In re Maanum, 828 F2d 459 (8th C.A. 1987). In comparing at that provision providing for additional time from a filing of Bankruptcy during a redemption period to the automatic immediate extinguishing of right of redemption when one files prior to a Sheriff's sale, (prior to the cure period contemplated by 108(b)) it would appear such effects the exact opposite of what is intended by the Congress.

The Bank below set forth, and the Iowa Supreme Court apparently accepted, the argument that a debtor who wished under Iowa law to preserve his property rights under Iowa law should not stop the sheriff's sale with his bankruptcy but should wait until after the sheriff's sale to file his bankruptcy. That argument totally paints the conflict between federal and state law. If the debtor did wait until after the sheriff's sale to file for protection of bankruptcy in Chapter 12, he would find that the provisions of 11 USC 108 would then apply. Instead of

the contemplated three-year period of Chapter 12 to reorganize, he would have only the 60 day period to cure default. Therefore, he must file his bankruptcy prior to the sheriff's sale to retain the property necessary to reorganize. Yet, if he does so and is not successful in bankruptcy, under Iowa law he has forfeited those redemption and repurchase of homestead rights that he would have had if he had not tried to reorganize in bankruptcy! Chapter 12 contemplates that a plan be confirmed 90 days following filing. By attempting to reorganize, he effectively looses two years of state rights for 90 days protection in bankruptcy pending attempt to reorganize.

The automatic forfeiture of a property right flowing as a direct result of the commencement of a Bankruptcy proceeding is a termination of a property right without any process whatsoever. The notice to be heard and the opportunity for a meaningful hearing on that issue are totally absent. Furthermore, the property right is terminated as a result of the invocation of due process granted pursuant to Federal law. Thus, not only is a property right extinguished without due process of law but in fact as a direct result of the invocation of federal due process of law.

The extinguishing of a proprietary right flowing as a result of the commencement of a Bankruptcy proceeding is also punitive in nature for the reason that it classifies

those who file Bankruptcy differently from those not filing, and sanctions those filing Bankruptcy by denying to them certain rights. Not only is such provision punitive, but because it is penal for invocation of a Federal remedy, it is a violation of the supremacy provisions of the United States Constitution.

The Fourteenth Amendment of the United States Constitution provides that debtor and creditor are to be treated equally. (Wright v. Union Central Insurance Co., 311 US 273, 278-279, which upheld the second Fraizer-Lemke Act, 49 Stat. 942; the prototype for Chapter 12. See, Congressional Record - Senate, October 3, 1986, at S15074). This equal treatment is due whether in or out of bankruptcy. The interpretation of the Court denying rights to those filing Bankruptcy is an invidious discrimination against those so filing and is violative of such equal protection provisions. The matter is magnified when one contemplates that such denial of equal protection is a penalty for invocation of Federal remedy directly enumerated by the United States Constitution.

It has been held that the delay caused by the stay of bankruptcy is not a taking. It is of temporary nature, and has protections of lifting of the stay or adequate protectin built into it. It is procedural delay only. Re Briggs Trans. Co., 780 F.2d 1339 (1985). Predicated solely from invocation of such procedural delay, the Iowa

legislature has enacted, and the Iowa Supreme Court has allowed, loss of substantive property rights. Furthermore, it has cancelled substantive property rights which are defined and protected under federal bankruptcy law.

The Appellant respectfully requests that the Court determine that the provision of the Iowa law ending right of redemption and of repurchase of homestead to one having sought the protection of federal bankruptcy is repugnant to the Constitution of the United States.

CONCLUSION

Danny L. Milburn respectfully requests this Court to issue Writ of Certiorari to the Iowa Supreme Court to review and correct its decision.

Respectfully submitted this ____ day of June, 1989.

Danny L. Milburn,

Marlyn S. Jensen, P.C.

By: _____

Marlyn S. Jensen, P.C.

Route 2
Osceola, Iowa 50213-9722
Telephone (515) 342-3530

ATTORNEY FOR PETITIONER

DECLARATION OF PROOF OF SERVICE

I, Marlyn S. Jensen, counsel for Danny L. Milburn, under 28 USC 1746, do affirm and declare that a copy of the foregoing Petition and attached Appendix, as corrected, was served on Carol Wendl, 1119 High Street, Des Moines, Iowa 50308 by depositing such copy in a United States postal mailbox, with first-class postage prepaid in accordance with Rule 28.3 and Rule 28.4(a) of the Rules of the Supreme Court of the United States.

I affirm that the foregoing is true and correct.

_____

Marlyn S. Jensen

Subscribed and sworn to before me, a Notary Public, on this ____ day of June, 1989, by the above named Marlyn S. Jensen, who is personally known to me to be the same person who has affixed his signature.

_____

NOTARY PUBLIC.

A P P E N D I X

IN THE SUPREME COURT OF IOWA

HAWKEYE BANK & TRUST N.A., OF CENTERVILLE-SEYMOUR f/k/a CENTERVILLE NATIONAL BANK,

vs.

DANNY L. MILBURN, et. al.,

Appellants.

Filed March 22, 1989

345

87-1759

[As Reported at: 437 NW2d 919]

Appeal from the Iowa District Court for Appanoose County, James P. Rielly, Judge.

Debtor challenges the constitutionality of Iowa Code section 628.4. The creditor bank challenges the district court order exempting the redemption rights in homestead property from the provisions of Iowa Code section 628.4. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Marlyn S. Jensen, Osceola, for appellant.

Carol Wendl of Neiman, Neiman, Stone & Spellman, Des Moines, for appellee.

Considered en banc.

ANDREASEN, J

In First National Bank v. Matt Bauer Farms Corp., 408 N.W.2d 51, 55 (Iowa, 1987), we held that an automatic stay resulting from the filing of a voluntary petition in bankruptcy is a "stay" within the meaning of Iowa Code section 628.4 (footnote [1]) and acts to bar a debtor's statutory right to redeem from a real estate foreclosure sale. In this appeal we are presented with challenges to the constitutionality of 628.4. We hold it constitutional. We also hold the statutory homestead right of redemption may be extinguished under its provisions.

I. In 1976, Hawkeye Bank & Trust, N.A. of Centerville-Seymour (bank) financed the farming operation of Danny L. Milburn. This loan was secured by a mortgage on 320 acres of real estate. In 1982, Milburn defaulted on this note. Milburn filed for bankruptcy under Chapter 11 of the United States Code in December of 1982. In May of 1984, the bank obtained relief from the automatic stay and on August 20, 1984, it filed a foreclosure action.

On the day before the scheduled trial, Milburn filed a second Chapter 11 bankruptcy petition. The bank again obtained relief from the stay and the bankruptcy petition was

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1. Unless otherwise indicated, all references to the Iowa Code will be to the 1987 Iowa Code.

dismissed in November 1986. The bank was granted a decree of foreclosure on December 23, 1986, and a sheriff's foreclosure sale was scheduled for April 23, 1987.

On April 22, 1987, one day prior to the scheduled sale, Milburn filed his third petition in bankruptcy, this time under Chapter 12 of the Bankruptcy Code. The bankruptcy court dismissed the Chapter 12 petition based in part on Milburn's bad faith and abuse of funds in the debtor-in-possession account. After this dismissal, the court rescheduled the foreclosure sale for November 19, 1987. The bank submitted to the Iowa district court a motion requesting that the sheriff issue a deed rather than a sheriff's certificate at the time of sale.

On November 17, 1987, Milburn again entered a bankruptcy court and obtained a federal court order to stay the scheduled sale pending appeal of the federal court dismissal of the Chapter 12 petition. The appeal was not perfected and the foreclosure sale was again scheduled. The Iowa district court, meanwhile ruled Milburn was entitled to redeem the homestead portion of the real estate under the provisions of Iowa Code section 654.16 but that he was not entitled to redeem the remaining portion of the land. Both parties appealed.

Milburn argues the district court erred in ruling that the automatic stay provisions in Title 22 United States Code section 362

(1982) extinguish the right of redemption found in Iowa Code section 628.3. According to Milburn, this ruling is unconstitutional as it allows the taking of property without due process, it denies certain debtors equal protection of the law, and it violates the supremacy clause of the United States Constitution.

The bank denies that section 628.4 is unconstitutional. The bank also argues Milburn's statutory right to redeem the homestead under section 654.16 is barred under the provisions of section 628.4.

II. Chapter 654 of the Iowa Code outlines the procedure for real estate foreclosure. When a real estate mortgage is foreclosed, the court renders judgment for the entire amount found to be due and directs the mortgaged property to be sold to satisfy the judgment, interest and costs. Iowa Code Sec. 654.5. A special execution is issued directing the sheriff to sell the mortgaged real estate. The sheriff must give four weeks' notice of the time and place of selling real estate. Iowa Code Sec. 626.74. Generally, foreclosure sales are subject to redemption and the purchaser at the sale receives a sheriff's certificate of purchase rather than a deed.

Chapter 628 of the Iowa Code provides a right of redemption for mortgage debtors and creditors. Although a one-year redemption period is provided by section 628.3, other

time periods for redemption are provided depending upon the use of the mortgaged property, the terms of the mortgage, the size of the mortgaged property, whether the property has been abandoned, and whether the mortgagee has waived the right to a deficiency judgment. Iowa Code Sec. 628.26-28. Under these provisions the statutory time period for redemption may be as short as thirty days or as long as five years.

Not all real estate foreclosure sales are subject to redemption. A party who stays execution on the judgment is not entitled to redeem. Iowa Code Sec. 628.4. If the mortgaged property is not used for an agricultural purpose, the plaintiff in an action for foreclosure of a real estate mortgage can elect foreclosure without statutory redemption. See 1987 Iowa Acts ch. 142, Sec. 6-9 (to be codified at Iowa Code section 654.20-.23).

The statutory rights of redemption should not be confused with the equity of redemption. A mortgage debtor has an equity of redemption until the foreclosure sale, and not afterwards. After the foreclosure sale, the mortgage debtor has the right of redemption if the statute so provides. See Lincoln Joint Stock Land Bank v. Mitchell, 239 Iowa 995, 1006, 33 N.W.2d 388, 394 (1948); Mayer v. Farmers' Bank, 44 Iowa 212, 216 (1876); G. Osborne, Mortgages, Sec. 8, at 17 (2d ed. 1970).

III. Milburn raises constitutional challenges to section 628.4 and its application under federal bankruptcy law. Under the Bankruptcy Act the debtor's estate includes all legal and equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. Sec. 541 (1982). Upon filing a petition in bankruptcy an automatic stay is triggered. 11 U.S.C. Sec. 362(a)(1982).

A. Milburn asserts section 628.4 facially, or as applied by the court, violates the due process and equal protection provisions of the United States Constitution. Iowa has no duty to provide a statutory right of redemption. Approximately one-half of the states do no provide a right of redemption to the mortgage debtors or creditors. G. Nelson & D. Whitman, Real Estate Finance Law, Sec. 7.2 & 8.4 (2d ed. 1985) Where such right exists, it is by statute, and the right extends only to cases coming within the statute. Northwestern Mut. Life Ins. Co. v. Hansen, 205 Iowa 789, 794, 218 N.W. 502, 505 (1928).

We addressed both the due process and equal protection challenge to section 628.4 in Farmers' Trust and Savings Bank v. Manning, 359 N.W.2d 461 (Iowa 1984). In Manning, we recognized the statutory right of redemption ran from the date of the foreclosure sale. Id. at 464. We found section 628.4 was justified to prevent the unfair extension of the redemption period by

delaying tactics and to make real estate more marketable. Id. We described the statutory right to redeem and Section 628.4 as the legislature's way of setting up a "scheme which carefully balances the rights and obligations of all those involved when a real estate mortgage is foreclosed." Id. at 464. Although Manning involved a constitutional challenge arising out of the debtors' exercise of their right of appeal, the constitutional analysis would also apply where the debtor secures a stay of execution.

B. Milburn asserts Iowa Code section 628.4 facially, or as applied by the district court, violates the supremacy clause of the United States Constitution. U.S. Const. art VI, cl. 2. Under the supremacy clause the state statutes which interfere with, or are contrary to federal law are invalid. As stated in Johnson v. First National Bank, 719 F.2d 270, 273 (8th Cir. 1983), cert. denied, 465 U.S. 1012, 104 S.Ct. 1015, 79 L.Ed 2d 245 (1984):

Where Congress has chosen to exercise its authority, contrary provisions of state law must accordingly give way. It is equally well settled, however, that state laws are suspended only to the extent of actual conflict with the bankruptcy system provided by Congress, so that in the absence of any conflict between the state and bankruptcy laws, the law of the state where the property is situated governs questions of property rights.

Under the Bankruptcy Act, Congress has generally left the determination of property rights of a bankrupt estate to state law. Property interests are created and defined by state law. Butner v. United States, 44 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed. 136, 141 (1979). The existence of a "legal or equitable interest: is determined by state law. Once it is determined that such a property interest exists, it automatically becomes property of the estate under section 541 of the Bankruptcy Act.

Deciding whether a state statute is in conflict with a federal statute and hence invalid under the supremacy clause is essentially a two-step process of first ascertaining the construction of the federal and state statutes and then determining whether they are in conflict. Perez v. Campbell, 402 U.S. 637, 644, 91 S.Ct. 1704, 1708, 29 L.Ed. 2d 233, 239 (1971).

One of the primary purposes of the Bankruptcy Act is to give debtors a new opportunity in life and a clear field for future efforts, unhampered by the pressure and discouragement of preexisting debt. Perez, 402 U.S. at 649, 91 S.Ct. at 1710-11, 29 L.Ed. 2d at 242. The automatic stay provisions of the Bankruptcy Act give the debtor a breathing spell from creditors and stops all collection efforts and foreclosure actions. Section 541 of the Bankruptcy Act preserves the assets for distribution of the debtor's property to creditors in

satisfaction of debts.

Our Iowa redemption statute provides a right of redemption that arises at the time of the foreclosure sale providing the debtor has not delayed the sale by securing a stay of the foreclosure judgment. Because of the clear legislative mandate, the statutory right of redemption is barred whenever the debtor secures a stay of the execution on the judgment, regardless of how the stay is obtained. It is clear the intent of Section 628.4 is that a debtor who obtains a stay order should not be entitled to have the benefits of both the delay of the foreclosure sale and the statutory right of redemption. A federal stay order granted in bankruptcy court is treated the same as a stay order granted in state court. Fitch v. Cornelison, 224 Iowa 1252, 1253, 278 N.W. 309, 310 (1938); see also First Nat'l Bank v. Matt Bauer Farms Corp., 408 N.W.2d 51, 55 (Iowa 1987).

When we compare Iowa's statutory scheme of redemption with the tolling and property provisions of the federal Bankruptcy Act, we find there is no conflict. Both the equity of redemption and the statutory right of redemption are property of the estate under Section 541 of the Bankruptcy Act. If a debtor files a bankruptcy petition after the foreclosure sale, the debtor's statutory right of redemption is property in the estate. Although section 362(a) would not toll the statutory redemption, section 108 of

the Bankruptcy Act would assure minimum redemption period of sixty days for the estate. Johnson v. First Nat'l Bank, 719 F.2d 270, 275-76 (8th Cir. 1983).

If a debtor files a bankruptcy petition before the foreclosure sale, the debtor's equity of redemption is property of the estate. The general tolling provisions of the Bankruptcy Act will preserve this property interest until the release of that property by the trustee.

We find no conflict between Iowa Code section 628.4 and section 541(c)(1) of the Bankruptcy Act. Under this bankruptcy provision, a property interest of the debtor is reserved notwithstanding applicable nonbankruptcy law if that interest is conditional on the commencement of a bankruptcy action. The Iowa debtor who proceeds into bankruptcy before the foreclosure sale has only an equity of redemption. This equitable property interest is not forfeited, modified, or terminated by the bankruptcy filing.

IV. The bank claims Milburn does not have a right to redeem the homestead property because of the application of section 624.4. Under Iowa Code section 654.16 the mortgagor may redeem a farm homestead separately by tendering the fair market value of the homestead pursuant to Iowa Code chapter 628. By the inclusion of the provisions of chapter 628, the legislature expressed its intent to

include the redemption of farm homesteads under the general provisions of redemption of real estate contained in chapter 628. Under this overall scheme of redemption a mortgage debtor who has stayed execution is prohibited from claiming the statutory right of redemption. We reverse the district court ruling exempting the homestead and return the case to the district court for a ruling consistent with this opinion.

V. Both parties failed to comply with Iowa Rules of Appellate Procedure 15 and 16. Both failed to provide an index to the appendix or amended appendix as required by Iowa Rule of Appellate Procedure 15(d). We tax the cost of printing the amended appendix to the bank. All remaining costs are taxed to Milburn.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All justices concur except Carter, Harris, and Schultz, JJ., who dissent.

CARTER, J. (dissenting).

I dissent from the opinion of the court because I believe the consequences which it attaches to the automatic stay arising from the automatic stay violate the supremacy clause of the federal constitution. The resulting forfeiture of the debtor's redemption rights obviously provides a

chilling impact on the debtor's freedom to seek the protections afforded by federal law. A strong argument can be made for a supremacy clause violation even if Congress had not enacted a specific statute to prevent such forfeitures from occurring. Because Congress has enacted a specific statute to prevent such occurrences, the resulting violation of the supremacy clause is inescapably obvious.

Iowa Code section 628.3 creates a right of redemption in the judgment debtor as a property right. That right is assignable pursuant to section 628.25. Federal bankruptcy courts have recognized that the debtor's right of redemption of real property is a legal and equitable interest in property and constitutes part of the debtor's bankruptcy estate. Johnson v. First Nat'l Bank, 719 F.2d 270, 276 (8th Cir. 1983), cert. denied, 465 U.S. 1012 (1984). It is expressly provided in 11 U.S.C. section 541(c)(1) (West Supp. 1988) that

an interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee . . . and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in

property.

(emphasis added). Under the opinion of the court in the present case, this property right in which the debtor holds an interest is forfeited as a result of the automatic stay arising from a federal bankruptcy filing. I submit this result violates section 541(c)(1).

Viewed from the position of the debtor, the result which the court's majority is sanctioning significantly dilutes the benefits intended to be conferred by federal law. If the debtor takes advantage of these federally created rights prior to execution sale of the debtor's property, that election, under the majority's opinion, triggers a substantial loss of rights under state law. Viewed from the point of view of the federal bankruptcy court, this forfeiture of redemption rights impacts in a negative way on the resources available to that court for purposes of achieving debtor rehabilitation.

The court's majority advances two theories in an attempt to avoid this obvious conflict with federal law. The first theory is that the debtor could wait until after the execution sale before filing for federal bankruptcy protection and thus avoid the forfeiture. The flaw in this theory is that this forced delay it itself a circumstance that amounts to a significant restriction of the debtor's options to invoke the federal protections. There will often be

circumstances in which financial burdens which flow from transactions entirely unrelated to the mortgaged property may require the debtor to seek the federal protection in advance of execution sale.

The second theory advanced by the majority suggests that if a bankruptcy petition is filed before the execution sale takes place then no right of redemption has arisen at the time of filing. From this premise, the majority reasons that the inchoate statutory right of redemption is not a property right which falls within the restrictions provided in 11 U.S.C. section 541(c)(1). This is an overly restrictive interpretation of the latter statute which significantly frustrates its intended operation. The forfeiture which, under the majority's opinion, occurs at the time of filing a federal bankruptcy petition clearly involves rights affecting property which will be subject to administration by the bankruptcy court. Consequently, I submit that the rights which are forfeited clearly fall within the category of interests which 11 U.S.C. section 541(c)(1) is intended to protect.

Harris and Schultz, JJ., join in this dissent.

NO. 88-2072

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM OF 1988

Supreme Court, U.S.
FILED
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DANNY L. MILBURN,

Petitioner,

vs.

HAWKEYE BANK AND TRUST N.A. OF CENTERVILLE-SEYMOUR f/k/a CENTERVILLE NATIONAL BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE IOWA SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

NO. 88-2072

DANNY L. MILBURN,

Petitioner,

vs.

HAWKEYE BANK & TRUST N.A. OF CENTERVILLE-SEYMOUR f/k/a CENTERVILLE NATIONAL BANK

Respondent.

QUESTIONS PRESENTED FOR REVIEW

I. THE PETITIONER'S REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED AS PETITIONER LACKS STANDING HAVING FILED A CHAPTER 7 BANKRUPTCY, AND THE REAL PARTY IN INTEREST IS THE BANKRUPTCY TRUSTEE.

II. PETITIONER'S REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED AS HAWKEYE BANK WOULD BE ENTITLED TO A DEED UNDER IOWA CODE §628.4 (1987) FOR STAYS OF THE SHERIFF SALE INVOKED BY PETITIONER ASIDE FROM THE AUTOMATIC STAY PROVISION OF THE BANKRUPTCY CODE.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE IOWA SUPREME COURT GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

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STATEMENT OF THE CASE

In 1976 Hawkeye Bank and Trust N.A., of Centerville-Seymour (hereafter "Hawkeye Bank") made a loan to the petitioner secured by a mortage on 320 acres of real estate. The petitioner defaulted on the loan in 1982 and subsequently filed a Chapter 11 Bankruptcy, the first of four bankruptcies. Relief was granted from the automatic stay, and Hawkeye Bank petitioned to foreclose its mortgage. The day prior to the scheduled trial date, the petitioner filed a second Chapter 11 Bankruptcy. Again relief from the stay was granted, and a Decree of Foreclosure was entered on December 23, 1986. A Sheriff's Sale was thereafter scheduled for April 23, 1987. On April 22, 1987, the petitioner filed his third Bankruptcy Petition, this petition pursuant to Chapter 12 of the Bankruptcy Code, again invoking the automatic stay provision. The Bankruptcy Court dismissed the Chapter 12, based

upon petitioner's bad faith, and abuse of funds, as well as the lack of feasibility of his plan.

Hawkeye Bank rescheduled the sale for November 19, 1987, and requested that the District Court order the sheriff to issue a deed in lieu of a Sheriff's Certificate, pursuant to Iowa Code §628.4 (1987), which request was granted by the Court as to the non-homestead property, on November 16, 1987.

The petitioner subsequently requested and received from the United States Bankruptcy Court for the Southern District of Iowa a fourth stay of the Sheriff's Sale, pending appeal of that Court's dismissal of petitioner's Chapter 12 Bankruptcy. After hearing, the stay was again lifted, and the sale rescheduled for January 14, 1988. Petitioner thereafter requested and received a temporary stay of the sale from the Iowa Supreme Court, again delaying the sale, but

a permanent stay was subsequently denied. The sale was finally held on January 22, 1988.

Petitioner appealed the District Court's ruling ordering the Sheriff to deliver a deed to all but the forty acre homestead. Hawkeye Bank appealed the District Court's decision to allow redemption rights on petitioner's forty acre homestead. While the appeal was pending, Petitioner filed a Voluntary Petition for Chapter 7 Bankruptcy in the United States District Court for the Southern District of Iowa. The stay was partially lifted for purposes of proceeding with the appeal, but the Chapter 7 Bankruptcy is still pending at this time.

The Iowa Supreme Court on appeal affirmed the constitutionality of Iowa Code §628.4 (1987) finding that no property right to redemption existed where petitioner invoked a stay of the Sheriff Sale.

SUMMARY OF ARGUMENT

I. THE PETITIONER'S REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED AS PETITIONER LACKS STANDING HAVING FILED A CHAPTER 7 BANKRUPTCY, AND THE REAL PARTY IN INTEREST IS THE BANKRUPTCY TRUSTEE.

The petitioner's filing of a Chapter 7 Bankruptcy prevents him from having a sufficient stake in the outcome of this controversy, as the real party in interest is the bankruptcy trustee.

II. PETITIONER'S REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED AS HAWKEYE BANK WOULD BE ENTITLED TO A DEED UNDER IOWA CODE §628.4 (1987) FOR STAYS OF THE SHERIFF SALE INVOKED BY PETITIONER ASIDE FROM THE AUTOMATIC STAY PROVISION OF THE BANKRUPTCY CODE.

In addition to the automatic stays in bankruptcy received by the petitioner, there are two other independently sufficient grounds for invoking §628.4 of the Iowa Code, and the Supreme Court should therefore refuse to utilize its discretionary power to review the Iowa Supreme Court's decision.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE IOWA SUPREME COURT GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

The Iowa Supreme Court correctly applied the due process, equal protection, and supremacy clause tests established by this court, and reached the correct decision that Iowa Code §628.4 (1987) was not unconstitutional, as no property right to redemption existed under Iowa law when the Petitoner filed bankruptcy.

ARGUMENT

I. THE PETITIONER'S REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED AS PETITIONER LACKS STANDING HAVING FILED A CHAPTER 7 BANKRUPTCY, AND THE REAL PARTY IN INTEREST IS THE BANKRUPTCY TRUSTEE.

In order to have standing, a party must have a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. Sierra Club v. Morton, 405 U.S. 727 (1972); Baker v. Carr, 369 U.S. 186 (1962). In this case, the petitioner filed a Chapter 7 Bankruptcy on

September 2, 1988, which case is still pending in the United States Bankruptcy Court for the Southern District of Iowa. While petitioner's discharge has been granted, the bankruptcy estate is still being administered and property, including any redemption rights, are currently the property of the bankruptcy estate and not of the petitioner. The petitioner, therefore, lacks a sufficient stake in the controversy to assert this matter on appeal, as reversal of the Iowa Supreme Court's decision would not operate to benefit him. Warth v. Seldin, 422 U.S. 490 (1975).

As the petitioner in this case lacks standing, the Petition for Writ of Certiorari should be denied.

II. PETITIONER'S REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED AS HAWKEYE BANK WOULD BE ENTITLED TO A DEED UNDER IOWA CODE §628.4 (1987) FOR STAYS OF THE SHERIFF SALE INVOKED BY THE PETITIONER ASIDE FROM THE AUTOMATIC STAY PROVISION OF THE BANKRUPTCY CODE.

A review on Writ of Certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 17. Under the facts of this case, if the Supreme Court grants certiorari and, in fact, reverses the Iowa Supreme Court's decision, basing its decision upon the alleged conflict between Iowa Code §628.4 (1987) and 11 U.S.C. §541, or upon the other issues raised by petitioner, the reversal would be largely without effect in this case. The petitioner received, in addition to the various automatic stays under the Bankruptcy Code, two additional stays of the Sheriff's Sale after the District Court's initial decision to grant a deed was rendered. Either of these two additional stays would be an independently sufficient ground upon which the petitioner would fail to obtain redemption rights. Neither would involve the consitutional problems alleged by this petition for certiorari, one of the stays having been

discretionarily granted by the Iowa Supreme Court, and the other a discretionary stay by the United States Bankruptcy Court for the Southern District of Iowa, pending appeal. Neither of these two stays would raise the Constitutional questions alleged by the petitioner, and Hawkeye Bank would still be entitled to receive a deed to the real estate rather than a certificate of sale.

The Supreme Court's decision to reverse in this case would not serve any beneficial purpose to the petitioner, and certiorari should therefore be denied.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE IOWA SUPREME COURT GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

The real issue in this case involves the definition of "property". As this court has held, "Property interests are created and defined by state law. . . Uniform treatment of property interests by both state and

federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall' merely by reason of the happenstance of bankruptcy," Butner v. United States, 440 U.S. 48, 55 (1979). As the multiplicity of bankruptcy filings by the petitioner clearly illustrate, the petitioner was and is attempting to do precisely that - obtain through bankruptcy "property rights" which by state law definition never existed.

The Iowa Code provides generally for redemption periods from zero to five years. Hawkeye Bank & Trust N.A. of Centerville-Seymour v. Milburn, _____ N.W.2d _____ (1989). The various redemption periods under Iowa law are all created by statute. However, as the Iowa Court found, there is a difference between the "equity of redemption" and statutory rights of redemption, Milburn, _____ N.W.2d at _____. In this

case, the petitioner's "equity of redemption" became property of the bankruptcy estate upon his filing of the bankruptcy petition. A statutory right of redemption, in contrast, would have arisen, if at all, only after the Sheriff Sale, Lincoln Joint Stock Land Bank v. Mutual, 239 Ia. 995, 1006, 33 N.W.2d 388, 394 (1948), and was therefore not property of the estate at the time of filing.

The Iowa Court addressed both the due process and equal protection issues, finding that §628.4 was justified to prevent the unfair- extension of the redemption period, and to make real estate more marketable ". . . §628.4 [is the] legislature's way of setting up a scheme which carefully balances the rights and obligations of all those involved when a real estate mortgage is foreclosed". Milburn, _____ N.W.2d at _____, citing Farmers Trust & Savings Bank v. Manning, 359 N.W.2d 461 (Iowa 1984). This

case exemplifies the very real concern with which the legislature was dealing. The petitioner defaulted on the mortgage in 1982. Because of the numerous stays invoked by the petitioner, the real estate was not sold until 1988. The petitioner in this case clearly received a period of time greatly in excess of the one year "redemption" time contemplated by the legislature.

In discussing the Supremacy issue, the court recognized that where Congress has chosen to exercise its authority, contrary provisions of state law must give way. Milburn, _____ N.W.2d at _____. However, the Bankruptcy Code generally fails to define "property", leaving that determination to the individual states. Butner, supra, 440 U.S. at 55. Therefore, the provision in 11 U.S.C. §541 which provides that property of an individual becomes property of the estate upon the filing of a

petition in bankruptcy, only applies to "property" which exists under state law.

In reaching its decision that there was no conflict, the Iowa Court followed the two-prong test prescribed by this Court in Perez v. Campbell, 402 U.S. 637, 644 (1971).

First, the court construed the two statutes allegedly in conflict, finding that §541 of the Bankruptcy Act was to preserve the assets of the debtor for distribution to creditors, and that §628.4 of the Iowa Code was designed to prohibit a debtor from receiving both a delay of Sheriff's Sale and statutory redemption. The court then found that the two statutes did not conflict, as property which existed at the time of filing (ie. the petitioner's equity of redemption) became property of the bankruptcy estate. Due to the fact that no foreclosure sale had yet been held, there was no statutory right of redemption existing at that time.

Hawkeye Bank and Trust N.A. v. Milburn, _____ N.W.2d _____ at _____ (1989).

The Iowa Supreme Court's decision fully and fairly considered the issues using the tests prescribed by this court, and the Petitioner's Petition for Writ of Certiorari should therefore be denied.

CONCLUSION

Due to the petitioner's lack of standing and to the fact that reversal would not ultimately benefit the petitioner, and due to the Iowa Supreme Court's full and fair consideration of these issues, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this _____ day of July, 1989.

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CERTIFICATE OF SERVICE

I, John H. Neiman, counsel of record for the Respondent, Hawkeye Bank and Trust N.A. of Centerville-Seymour, hereby certify that on the _____ day of July, 1989, the foregoing Brief in Opposition to Petition for Writ of Certiorari was served on Marlyn S. Jensen, Route 2, Osceola, Iowa 50213, by depositing a copy of the same in the U.S. Mail, with First Class postage prepaid, in accordance with Rules 28.3 and 28.5 of the Rules of the Supreme Court of the United States.

John H. Neiman

Supreme Court, U.S.
FILED
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NO. 88-2072

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM OF 1988

DANNY L. MILBURN,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE IOWA SUPREME COURT

PETITIONER'S REPLY

TO BRIEF OPPOSING CERTIORARI

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STATEMENT OF THE CASE IN REPLY

The Bank in its Brief in Opposition states at page 3 "The stay was partially lifted for purposes of proceeding with the appeal, but the Chapter 7 Bankruptcy is still pending at this time". Based upon the facts inherent in such statement and for its argument going totally outside the record in this case Bank asserts that no standing exists in Milburn.

However, Bank fails to mention that the following occurred in The United States Bankruptcy Court for the Southern District of Iowa, In Re Danny J. Milburn, Case No. 88-1831-C (Chapter 7), clearly demonstrating stake and standing.

On September 30, 1988, Thomas L. Flynn, Trustee, made his report without notice that he had abandoned the Real Estate herein concerned, and such was a no-asset case. Thereafter, Bank made bid to the Trustee for Milburn's redemption rights.

On November 23, 1988, in response to

actions of Bank and the Trustee, the Honorable Russell J. Hill entered order in such bankruptcy that the foregoing Trustee's No Asset Report be vacated and set aside.

On November 21, 1988, the Trustee gave notice that on December 21, 1988, subject to objection, he would sell "Any redemption rights the Debtor [Milburn] may have in connection with the foreclosure of the Debtor's farm by Hawkeye Bank and Trust Company. . ." to "Hawkeye Bank and Trust Company of Centerville, Iowa" for the consideration of "$500. cash". On December 8, 1988, Milburn made objection on various grounds including that such rights were personal to him, and the proposed sale denied to him the opportunity to bid for such rights, if necessary.

With the foregoing pending, on November 21, 1988, Bank made motion to the Bankruptcy Court asking that ". . . this court enter an order modifying the automatic stay for the limited purpose of allowing the Iowa Supreme

Court to adjudicate the issues as to the constitutionality of Iowa Code Section 628.4, which are pending before that court pursuant to the appeal instituted by the debtor, and Hawkeye's related cross-appeal. . . ". On December 8, 1988, Milburn joined Bank in requesting such relief from stay.

The Petition for Certiorari here is for final review and correction of the resulting Iowa Supreme Court decision.

After the decision of the Iowa Supreme Court, Bank gave notice to Milburn of its intent to sell such real property in total disregard of the bankruptcy proceeding.

ARGUMENT

I. THE PETITIONER REMAINS THE TRUE PARTY IN INTEREST.

The Trustee in Chapter 7 takes only that property which is not subject to prior security interests and which is not subject to exemption laws. The Trustee abandoned to Milburn and Bank the real property in

question. The Bank then made bid to the Trustee to purchase Milburn's redemption rights. Milburn objected, claimed such exemption rights to be personal to him, and demanded that he be afforded the right to also bid. Milburn and Bank are in contest over the redemption rights of Milburn. Both have a stake in the outcome of that contest which the Iowa Supreme Court decided adversely to Milburn. Milburn seeks review of that decision here. Milburn's personal and economic rights will rise or fall directly and proximately according to the decision of this Court. Warth v. Seldin, 422 U.S. 490 (1975). If the decision of the Iowa Court stands, Milburn has no redemption rights (including two years of possession) and he is harmed. If the Iowa decision falls, Milburn retains redemption, possession and homestead rights which are either personal to him or subject to purchase. Milburn clearly has standing.

Furthermore, Bank's argument proves too

much, and is itself a basis for reversal, for the reason that if there is no standing in this Court to determine such issue, then there was none in the Iowa Supreme Court either. If that is correct, the Iowa Supreme Court decision should be vacated so that the issue can be determined in the Bankruptcy Court.

II. NO STAYS WERE INVOKED OTHER THAN THOSE NECESSARY TO PRESERVE REDEMPTION AND HOMESTEAD RIGHTS.

Here, Bank is really seeking review of the Iowa Supreme Court decision, because the same argument was advanced by it there, and rejected. The Iowa Court recognized that any stays involved were to preserve rights on appeal and in reality merely supportive or ancillary to the primary issue - the constitutionality of the Iowa statute. Accordingly, the Iowa Court proceeded to decide that primary issue and which decision Milburn seeks reviewed here.

III. THE DECISION OF THE IOWA SUPREME COURT IS IN ERROR AND SHOULD BE VACATED.

The decision of the Iowa Court allows a state to tailor substantive property rights to be different for one who is or has been in federal bankruptcy. In so doing, it allows a state to circumvent the Supreme Law of the land and to invade that sphere pre-empted by federal law; allows forfeiture of valuable rights in violation of due process and equal protection guarantees; and in effect imposes sanction and penalty for having attempted reorganization in bankruptcy.

> "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy". (emphasis added). Butner v. United States, 440 U.S. 48, 55 (1978).

For federal bankrupcty law to be equally applied, state property rights within a state must remain consistent, uniform and non-varying to all. State definition making property rights different for one in or having filed bankruptcy inverts the Supremacy Clause. It renders state law supreme. It denies uniformity of treatment. It allows substantive property rights to be forfeited based solely upon the happenstance of bankruptcy. It penalizes those who have invoked federal due process.

The Iowa Court rationalized that the equity of redemption (which existed prior to sheriff's sale) did become a part of the bankruptcy estate and that because no statutory right of redemption existed at that time there was none forfeited by the bankruptcy stay. However as the dissenters on the Iowa Court observed, this is an overly restrictive interpretation which significantly frustrates the intended

operation of Title 11. Once sheriff's sale has occurred, a Chapter 11 or 12 Plan cannot cram down or stretch out the running of the state law redemption period. Justice v. Valley National Bank, 849 F.2d 605 (C.A. 8, 1988); In re DeMers, 853 F.2d 605 (C.A. 8, 1988; Bauer, Iowa's Homestead Exemption, pp 34-35 (Advanced Bankruptcy Procedures Seminar, Cedar Rapids, Iowa, July 27, 1989).

Furthermore, it is clear that IF MILBURN HAD NOT ATTEMPTED TO REORGANIZE IN BANKRUPTCY HE WOULD HAVE RETAINED THE STATUTORY RIGHT TO REDEEM HIS PROPERTY. Under Iowa law such right to redeem is not only a transferable property right (I.C.A. 628.25) BUT ALSO includes the right to possession of that real property during the two year redemption period (I.C.A. 628.3 facially states "one year" but under interpretation of the Iowa Supreme Court has been expanded to two years. FLB v. Arnold, 426 N.W.2d 153 (Iowa 1988)). Thus, as a direct and proximal result of his having invoked federal bankruptcy in effort

to reorganize, Milburn lost under Iowa law a transferable property right which included his right to POSSESS such property for two years following sheriff's sale. Such forfeiture resulted SOLELY from his having invoked federal due process.

CONCLUSION

Danny L. Milburn respectfully requests this Court to issue Writ of Certiorari to the Iowa Supreme Court to review and correct its decision. FURTHER, in the event the Court is of the opinion that standing is in fact a legitimate issue in this case that Writ of Certiorari also issue to the United States Bankruptcy Court for the Southern District of Iowa, In Re Danny J. Milburn, Case No. 88-1831-C (Chapter 7) pertaining to such issue. The Respondent has gone outside the record in making opposition, and the two proceedings would appear intertwined on that issue.

Respectfully submitted this ____ day of August, 1988.

Marlyn S. Jensen, P.C.

By_____

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ATTORNEY FOR PETITIONER.

DECLARATION OF PROOF OF SERVICE

I, Marlyn S. Jensen, counsel for Danny L. Milburn, under 28 USC 1746, do affirm and declare that a copy of the foregoing Petition and attached Appendix, as corrected, was served on John H. Neiman, 1119 High Street, Des Moines, Iowa 50308 by depositing such copy in a United States postal mailbox, with first-class postage prepaid in accordance with Rule 28.3 and Rule 28.4(a) of the Rules of the Supreme Court of the United States. Also, a copy of the Petition, Brief in Opposition and this Reply were sent by me to the Hon. Tom Miller, Attorney General of Iowa, Hoover Building, Des Moines, Iowa 50319.

I affirm that the foregoing is true and correct.

_____

Marlyn S. Jensen

Subscribed and sworn to before me on this ____ day of August, 1989

_____

NOTARY PUBLIC.